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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

PHILIP HARRY KOOLISH AND SARA ALLEN KOOLISH, INDIVIDUALLY AND TRADING AS STANDARD DISTRIBUTING COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

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v.

FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioners, Philip Harry Koolish and Sara Allen Koolish, individually and trading as Standard Distributing Company, pray that writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Seventh Circuit, affirming and enforcing a cease and desist order of the Federal Trade Commission.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 118) is reported in 129 F. 2d 64.

Jurisdiction.

The opinion of the circuit court of appeals was filed and its order of affirmance entered on June 9, 1942 (R. 118, 120). Petition for rehearing was denied July 16, 1942 (R. 151) and the decree of the circuit court of appeals was entered the same day (R. 151-153). The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 as amended by the Act of March 21, 1938, c. 49, sec. 3, 52 Stat. 11 (15 U. S. C. sec. 45) and section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the Federal Trade Commission may prohibit petitioners, distributors of standard merchandise, from supplying through the mails raffle cards or "push cards" which the recipients may or may not use in subsequent distribution of standard merchandise purchased from the petitioners where, as in this case:

(a) The Congress (1) by statute prohibiting the actual conduct of lottery transactions through the mails or through interstate commerce, and (2) by consistent rejection of proposed prohibitions, has made manifest its policy not to prohibit the movement through the mails or through interstate commerce of raffle cards or other chance devices whose regulation or prohibition has long been recognized to be a matter of local policy and practice to be effectuated by state and local regulation; and where, as here,

(b) such raffle cards or "push cards" have for a long period been mailed under a third-class permit validly issued

and validly continued in force by the Postmaster General in pursuance of the Postal Laws and Regulations and necessarily involving his administrative construction of the federal statutes as in no way prohibiting such cards from the mails.

2. Whether the circuit court of appeals erred in failing to hold that the Federal Trade Commission is without authority to enter a cease and desist order prohibiting the interstate distribution of standard merchandise with push cards which subsequently *may be used* in distributing such merchandise; or prohibiting interstate distribution of push cards which *may be used* in distribution of merchandise to the public.

3. Whether the circuit court of appeals, in sustaining the cease and desist order of the Federal Trade Commission, erred in failing to hold that there was no evidence to support the Commission's essential findings: (1) that many persons to whom petitioners, as part of their advertising literature, furnished push cards, subsequently use such cards in selling and distributing merchandise, and (2) that many persons are, by the element of chance, induced to buy and sell petitioners' merchandise in preference to merchandise offered for sale by competitors.

Statute Involved.

Section 5 of the Federal Trade Commission Act, September 26, 1914, c. 311, 38 Stat. 717, 719, as amended by Act of March 21, 1938, c. 49, sec. 3, 52 Stat. 111 (15 U. S. C. sec. 45), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, ex-

cept banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Statement.

The Federal Trade Commission has entered, and the Circuit Court of Appeals has affirmed, a cease and desist order which prevents petitioners from including in their sales promotion or advertising literature a push card which may or may not be utilized by the recipient as a raffle device in subsequently disposing of standard merchandise which he may own or buy from petitioners through an outright sale. The decision of the lower court that this constitutes an unfair method of competition by petitioners is based solely on a holding that the supplying of such free raffle cards was a practice contrary to the "established public policy of the United States." Because of ambiguities therein, certain of the findings of fact of the Commission can be rightly understood only by reference to the uncontradicted evidence. Briefly summarized, the findings and uncontradicted evidence show:

The petitioners sell and distribute in interstate commerce a large volume of merchandise including household wares and appliances, clothing, clocks, jewelry and cosmetics (R. 96). They also send through the United States mails circular letters each of which includes literature descriptive of this merchandise, an order blank and a simple and inexpensive raffle device commonly referred to as a push card (R. 96-97). As shown by the original exhibits, these mailings were under the third-class rate provisions. The third-class mailing privilege was under license granted

and continued in force under the Postal Laws and Regulations (1940) § 5.62 (39 C. F. R. § 5.63).

The sale of the merchandise from the petitioners to their customer is outright, neither on consignment or as agent and involves no element of chance (R. 80-81).[1] The petitioners retain no interest in, or control over, the merchandise or the raffle card after these pass into the hands of the customer. The customer upon his purchase of the merchandise becomes the absolute owner thereof and is free to use or dispose of it as he desires; if he determines to dispose of the merchandise, he may or may not use the raffle card, as he sees fit (R. 118). There is no question that the merchandise was fairly described, and represented fair value; it was sold with a money-back guaranty (R. 60, 66, 67, 72, 79, 80).

The evidence showed that petitioners do a large amount of business (R. 73, 81-83). However, the number, if any, that were attracted by the suggestion of the possibility of raffling off their purchases rather than by the attractive price at which the merchandise was sold, does not appear. Neither was there any evidence presented to show that even a single purchaser from respondent did raffle off merchan-

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[1] This reference to the evidence is essential to clarify Par. Five of the findings of the Commission (R. 99):

> "The sale of merchandise to the purchasing public according to respondents' sales plan involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the normal retail price thereof. * * * The use by respondents of the aforesaid sales plan or method in the sale and distribution of their merchandise, and the sale of such merchandise by the aid of and through the use thereof, is * * * contrary to public policy" * * *.

It is clear that sale by petitioners involves no game of chance and that petitioners use no sales plan or method involving a game of chance. It would be correct to say that their sales plan involves the suggestion to the prospective purchaser of possible use of a chance device for subsequent distribution by him and the furnishing to him of such a chance device.

dise acquired from petitioners or did use push cards supplied by petitioners in doing so.[2]

The Commission's cease and desist order (R. 100-101) and the Court's decree confirming the same (R. 151-153) prohibit from interstate commerce not only the disposal of merchandise *by means of* push cards, punch boards or other chance devices (which petitioners do not do) (par. (3)); and not only the distribution of merchandise "*together with*" push cards, punch boards or other chance devices which may be used in distributing such merchandise (which petitioners do not do) (par. (1)); but as well the distribution of the push cards, punch boards, or other chance devices themselves (par. 2) "separately" (R. 101, 152 pars. 1, 2 and 3).

This last prohibition, i.e., against the distribution of push cards, punch boards and other chance devices 'separately" (par. (2) of the order and of the decree), contains the further clause reading "which push or pull cards, punch boards, or other lottery devices are to be used, or *may be used,* in selling or distributing such merchandise to the public."[3]

The affirmance of the order by the circuit court of appeals is grounded upon the broad proposition that here petitioners were supplying to others "means of conducting

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[2] In this respect, Paragraphs Four and Five of the Commission's findings (R. 99), aside from their misleading character, are without evidence in the record to support them and contrary to the holding of the court below (R. 119).

[3] Most, if not all, punch boards or other chance devices "may be" used in the distribution of merchandise upon a chance basis and accordingly this prohibition may fairly be considered as an attempt broadly to prohibit any distribution in interstate commerce of push cards, punch boards or other chance devices, whether distributed with merchandise or separately and independently thereof. This position was avowed by Commission's counsel in the oral argument in the circuit court of appeals and reflects the position taken in subsequently instituted proceedings now of public record before the Commission against manufacturers of push cards, punch boards and other chance devices. 2 C. C. H. Trade Reg. Serv. (8th ed.) ¶¶ 9972.24, 9972.50, 9972.88, 9977.63, 9978.58.

lotteries in the sale of merchandise'' and that this is ''contrary to the established public policy of the United States'' (R. 119).

Specification of Errors to be Urged.

The circuit court of appeals erred—

1. In holding that the Federal Trade Commission has jurisdiction to prevent the supplying—in the offering for sale in interstate commerce of standard merchandise or separately—of push cards or other means whereby the offeree, at his sole option, may subsequently distribute the merchandise locally on a chance basis.

2. In failing to hold that the established public policy of the United States includes no prohibition against supplying to others—in the advertising of standard merchandise, or separately—means such as push cards or raffle cards whereby the recipients may subsequently distribute merchandise by chance, where the merchandise is not by form, by method of packaging, or by agreement or other understanding with the vendees, committed to distribution on a chance basis or in a manner involving deception.

3. In failing to hold that there was no evidence to support the Commission's findings: (1) ''that many of the individuals, dealers, and others to whom respondents furnished said push cards have used, and do use, the same in purchasing, selling, and distributing merchandise which they buy from respondents''; and (2) ''Many persons are attracted by * * * the element of chance involved therein [in the push cards supplied] and are thereby induced to buy and sell respondents' merchandise in preference to merchandise offered for sale and sold by said competitors of respondents''.[4]

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[4] This error is not relied upon as a reason for granting the writ but is stated as a question presented, supra, p. 3, and will be briefed if the writ is granted.

4. In holding that under the Federal Trade Commission Act the Commission has authority to prevent the supplying to others through interstate commerce of (1) merchandise together with push cards that "may be used" in subsequently distributing such merchandise by chance and (2) push cards which "may be used" in distributing merchandise to the public by chance.

Reasons for Granting the Writ.

1. AN IMPORTANT QUESTION OF FIRST IMPRESSION IS HERE PRESENTED AS TO THE AUTHORITY OF THE FEDERAL TRADE COMMISSION UNDER THE FEDERAL TRADE COMMISSION ACT TO INVADE AND EXERCISE JURISDICTION IN A FIELD WHICH THE CONGRESS HAS REPEATEDLY INDICATED IS NOT TO BE REGULATED BY FEDERAL AUTHORITY.

The Commission here asserts authority to prohibit interstate commerce in push cards, punch boards and other raffle devices because they are susceptible of being used to distribute property upon a chance basis. This is but another in the series of attempts by that Commission to arrogate to itself jurisdiction beyond that conferred upon it by Section 5 of the Federal Trade Commission Act. Cf. *Federal Trade Comm.* v. *Gratz*, 253 U. S. 421; *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19; *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643; *Federal Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349.

The position of the Commission is an unwarranted extension and misinterpretation of the decision of this Court in *Federal Tr. Comm'n* v. *Keppel & Bro.*, 291 U. S. 304. It is in disregard of the boundaries marking that area traditionally recognized by Congress and by this Court as peculiarly within the jurisdiction of state and local regulatory powers, and, as is shown by specific action of Congress, by it intended to remain free of federal regulation. The order

of the Commission in the exercise of this assertedly implied jurisdiction brings it into conflict with the exercise by the Postmaster General of the jurisdiction expressly delegated to him by the Congress and specifically exercised by him in this case.

(a) *The Federal Trade Commission has been given, and this Court has recognized in it no broad jurisdiction to impose any and all prohibitions upon interstate commerce which from time to time it may deem to be in the public interest.*——It is doubtful whether so broad a delegation of power would be valid. Delegation of unlimited power to prescribe codes "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest" has been by unanimous decision held invalid because "instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them." *Schechter Corp. v. United States,* 295 U. S. 495, 541. In the same case, distinguishing that invalid grant of power from the powers conferred in the Federal Trade Commission Act, this Court said (p. 535):

> The authority sought to be conferred by § 3 was not merely to deal with "unfair competitive practices" *which offend against existing law,* and could be the subject of *judicial condemnation without further legislation,* or to create administrative machinery *for the application of established principles of law* to particular instances of violation. (Emphasis supplied.)

In recognition of this fundamental distinction, Congress in enacting the National Labor Relations Act did not broadly proscribe "unfair labor practices" and empower an agency to specify what those words were to include, but stated specifically what acts or practices are to be so regarded. 29 U. S. C. sec. 158. Similarly, in the Bituminous Coal Act the "unfair methods of competition" are carefully specified. 15 U. S. C. sec. 833 (i).

It is in the light of the limitations of these fundamental principles that the authority conferred by the Federal Trade Commission Act has by the Courts been construed and the constitutionality of the Act sustained against the charge of indefiniteness. In *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307, 311, the first case in which the question was raised, the Act was held valid because it is to be understood as empowering the Commission to proceed against those acts which, under the substantive law of unfair competition, but irrespective of whether they have been specifically denounced in common-law cases, are subject to judicial condemnation as having "a tendency to injure competitors directly or through deception of purchasers". In *Federal Trade Comm.* v. *Gratz,* 253 U. S. 421, though not passing directly on the validity of the Act, this Court said that the words "unfair methods of competition" could not validly be held to apply to practices not within the purview of the anti-trust laws or not "characterized by deception, bad faith, fraud or oppression" (p. 427). And this Court accordingly held that "all questions of monopoly or combination being out of the way" and there having been no consumer deception, the practice there complained of was not within the jurisdiction of the Commission to proscribe (p. 428).

In *Federal Tr. Comm'n* v. *Keppel & Bro.,* 291 U. S. 304, the Commission obtained review of the conclusion of the lower court that there was "nothing in the petitioner's practices tending to hinder competition or create monopoly" and that "there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer" (63 F. 2nd 81, 83). The subject matter there was candy packaged for the children's penny candy trade, the contents being specially arranged, marked and displayed for chance distribution.

In this Court the Commission relied principally on the *Gratz* case, *supra,* and *Federal Trade Comm.* v. *Winsted Co.,* 258 U. S. 483, both decisions clearly supporting the Commission's jurisdiction to prohibit consumer deception. The Commission stressed the position that asking the child to engage in a chance transaction was akin to deception.[5]

This Court adopted that position saying (291 U. S. 304, 309, 313):

> * * * the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package * * *
> * * * we can perceive no reason for distinguishing between the element of chance *as employed here* and *the element of deception involved in labelling cotton goods "Natural Wool"* as in the *Winsted* case. (Emphasis supplied.)

There was evidence and the Commission found that "many manufacturers of competing candies refuse to engage in the distribution of the break and take type of package because they regard it as a reprehensible encouragement of gambling among children". This Court held that such a form of competition, requiring competitors either to descend to the distribution of such packages against powerful moral compulsion, or to lose business, was unfair.

But the only evidence adduced by the Commission in the instant case showed no moral restraints on the part of

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[5] It contended in its reply brief in that case, pp. 2-5, that "Inducing purchases by appealing to the cupidity and gambling instincts of children is assimilable to deception". The chance element does "not operate upon his purchasing judgment with normal effect." "The child would seem to be as much entitled to protection against an unfair sales practice in respect to penny candy as is the adult in respect to a woolen garment [in the Winsted Hosiery case]".

competitors [6] but rather that their objections were based on the "serious" or "annoying" competition offered by distribution by chance devices and the fact that in some cases much cheaper merchandise is supplied at the same price (R. 37, 39, 40, 45, 47).[7]

Neither has it been suggested that sale to children or any other equivalent of deception or unfair exploitation of the customer is involved in the ultimate chance distribution which occurs if petitioners' push cards are used by the recipient.

It is, therefore, on the facts and under the law, a far cry from the *Keppel* case now to hold that the Commission under its present grant of jurisdiction may prohibit your petitioners or other distributors from supplying their customers with raffle cards. While this Court observed in the *Keppel* decision that the practice there involved was of the sort "which the common law and criminal statutes have long deemed contrary to public policy" (p. 313), the Court did not profess to declare, as did the court below in this case, that the supplying to others of the "means" for the distribution of property upon a chance basis is "contrary to the established public policy of the United States" (R. 119).

(b) *On the facts, exercise of jurisdiction by the Commission in this case is without support, implied or otherwise, either in the rule of the Keppel case, or in the subsequent*

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[6] It is established that large sectors of the population recognize no inherent immorality in raffles or any other game of chance (6 Encycl. Soc. Sci., pp. 557-558; 6 Catholic Encyclopaedia, p. 375).

[7] There was no suggestion of how the use of chance devices in the secondary distribution of merchandise lends itself more readily than does any other method of mail-order selling to the "gypping" of the public concerning which the witness generalized (R. 46). Indeed, petitioners' merchandise was shown to be sold with a money-back guarantee and at prices comparing very favorably with those at which the same or similar merchandise was regularly sold by others (R. 60, 66, 67, 72, 79, 80).

federal decisions which have applied it.——Since the decision of this Court in the *Keppel* case, where the jurisdictional determination of the circuit court of appeals was reversed (see p. 11, supra) the Commission has extended its asserted jurisdiction to situations where jurisdiction was admittedly less clear than that which appeared from the findings and decision in that case. In a number of them this court, without ruling on the merits, has denied certiorari.[8]

But the jurisdiction here asserted by the Commission goes beyond that involved in any of the previously adjudicated cases. The Commission so recognized in its brief in the court below;[9] and the circuit court of appeals also recognized the factual differences from the case cited as authority by it (R. 118).

In the previous cases the merchandise was, at point of shipment, *committed* to distribution upon a chance basis either (1) by special assembly, packing and marking as in the "break and take" cases; or (2) by *commitment* with the local distributor as in *Chicago Silk Co.* v. *Federal Trade Commission,* 90 Fed. 689 (C. C. A. 7). The opinion of the circuit court of appeals in the instant case recognized that in that case " the money for the purchase of the goods was *transmitted after collection by the push card method*". In that case, as the record confirmed and as the court recognized, the push card recipient became in fact and in law the *distributing agent* of the manufacturer. Where he sold the chances he was obviously committeed to pro-

[8] *Hofeller* v. *Federal T. C.,* 82 F. 2nd 647, cert. denied, 299 U. S. 557; *Federal Trade Commission* v. *A. McLean & Son,* 84 F. 2nd 910, cert. denied, 299 U. S. 590; *Federal Trade Commission* v. *F. A. Martoccio Co.,* 87 F. 2nd 561, cert. denied, 301 U. S. 691; *Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. 2nd 689, cert. denied, 302 U. S. 753; *National Candy Co.* v. *Federal Trade Commission,* 104 F. 2nd 999, cert. denied, 308 U. S. 610.

[9] "It is true that no case with facts exactly like this one has previously reached the courts". Commission's Brief before the Court of Appeals in the instant case, p. 20.

ceed with the transaction by (1) collecting the proceeds, and (2) transmitting the proceeds to the manufacturer; (3) having the manufacturer send the merchandise pursuant to the commitment with the local distributor and the chance purchasers and then (4) distributing the merchandise upon a chance basis pursuant to his commitments with the manufacturer and with the chance purchasers. *That situation was within the very express prohibition of Congress* against the *actual conduct* of lottery transactions through federal channels. (See p. 15, infra.)

In the instant case the situation is fundamentally different. Here the merchandise is, of course, standard merchandise and there is no commitment, or arrangement, tacit or otherwise, by the shipper at the time of shipment or at any other time that the merchandise be distributed locally on a chance basis. The Commission in its brief before the lower court (p. 8) stated that when the customers purchase the merchandise from petitioners "it becomes their property, to keep or to dispose of as they see fit." The court recognized that "petitioners have no control of the mode of distribution after the goods leave their hands" (R. 119), and the raffle card sent in the earlier mailing enclosure, "may or may not" be used for distribution of any of the standard merchandise so purchased (R. 118).

It is, therefore, obvious that on the facts, neither the decision in the *Keppel* case nor any of the decisions which have since purported to follow it, may be regarded as precedent for this newest attempt to broaden the jurisdictions of the Commission beyond its delegated field.

c. *The basic position that it is "contrary to the established public policy of the United States" to place in the hands of others the means whereby property may be disposed of upon a chance basis, is palpably erroneous.*—The Constitution has vested in "The Congress", not in the

federal judiciary, the power "To regulate Commerce" and "To establish Post Offices and post Roads" (Art. 1, sec. 8). It is accordingly for "Congress" to say "what constitutes public policy in all matters confided to it by the Constitution or law". *Baker* v. *United States,* 27 F. 2d 863, 875, and cases cited. That this is particularly true in the subject matter here considered has been squarely decided in *The License Tax Cases,* 5 Wall. 462, where the Court said (p. 469):

> There are cases, it is true, in which arguments drawn from public policy must have large influence; but *these are cases in which the course of legislation and administration do not leave any doubt upon the question what the public policy is,* and in which what would otherwise be obscure or of doubtful interpretation, may be cleared and resolved by reference to what is already received and established.
>
> *The cases before us are not of this sort.* The legislature [Congress] has thought fit, by enactments clear of all ambiguity, *to impose penalties for unlicensed dealing in lottery tickets* and in liquors. These enactments, so long as they stand unrepealed and unmodified, *express the public policy in regard to the subject of them.* (Emphasis supplied.)

(1) The policy of Congress has been clearly manifested. It has prohibited the *actual conduct* of lottery transactions through interstate commerce or through the mails. Act of March 4, 1909, c. 321, secs. 213, 237, 35 Stat. 1129, 1136 (18 U. S. C. secs. 336, 387); see *Francis* v. *United States,* 188 U. S. 375.

More important, and highly significant, is the fact that Congress has consistently rejected and refused to enact numerous bills which, like the order of the Commission here, would have prohibited the movement through the mails or through interstate commerce of chance devices broadly and variously referred to in such proposals as

"chance" or "lottery" or "gambling" devices.[10] Cf. *In re Amtorg Trading Corporation*, 75 F. 2d 826, 832. This policy rests upon the position expressed by the present Administration in recommending the rejection of H. R. 4796, 75th Congress, as follows:

> As a matter of general policy, it appears highly doubtful whether the Federal Government should undertake to legislate on the subject of transportation of gambling devices, instead of leaving the matter to State and local regulation.
>
> I am informed by the Acting Director of the Bureau of the Budget that this legislation is in conflict with the program of the President. (Letter, April 21, 1937 from Attorney General Cummings to Hon. Hatton W. Sumners, Chairman, House Judiciary Committee).

(2) The underlying reason for this policy was recognized and applied by this Court in interpreting the Federal Trade Commission Act in *Federal Tr. Comm'n* v. *Bunte Bros.*, 312 U. S. 349, 354, where the Court said:

> The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters *heretofore traditionally left to local custom or local law.* Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination. As inroad upon *local conditions* and *local standards* of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. (Emphasis supplied.)

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[10] Among the rejected bills are:

S. 1541, 66th Cong.
S. 1543, 66th Cong.
H. R. 11954, 66th Cong.
H. R. 6071, 68th Cong.
H. R. 3935, 69th Cong.
H. R. 4004, 69th Cong.
H. R. 387, 70th Cong.
S. 1446, 71st Cong.
H. R. 2408, 71st Cong.
S. 182, 72nd Cong.
H. R. 353, 72nd Cong.
H. R. 7537, 72nd Cong.
S. 2570, 73rd Cong.
S. 3076, 73rd Cong.
S. 2559, 73rd Cong.
S. 6, 74th Cong.
H. R. 4796, 75th Cong.
H. R. 7464, 76th Cong.

(3) But the evidences of public policy in this matter as by Congress established and administratively applied are affirmative as well as negative. The whole basis of action by the Commission is that the "petitioners supplied to and placed in the hands of others, *means* of conducting lotteries in the sale of merchandise" (R. 119). But such supplying was through the United States mails *in accordance with positive and affirmative administrative determination that Congress* has manifested an intent that the mailing or interstate movement of the *means* whereby properties may be disposed of upon a chance basis *shall not be prohibited.* The court below has expressly recognized that as a class raffle cards such as those here involved validly pass through the United States mails. In *Schreiber* v. *United States,* 129 F. 2d 836 (C. C. A. 7) the court said (p. 837):

> Appellees are engaged in the business of manufacturing and selling certain types of cards known as "push-cards" and "pull-cards" which are used for raffling merchandise. * * *
>
> In 1933, in response to an inquiry from one of the appellees, addressed to the United States Post Office in Chicago, regarding the classification of the cards, the Acting Postmaster notified him *that the cards would be mailable* in unsealed parcels at the third or fourth-class rate when bearing the printed inscription on the outside including the name of the manufacturer or dealer. He commented on the fact that it was noted that the sales cards were to be sold outright and that *appellee's concern retained no interest in their operation after sale to the addressee.*

Petitioners' raffle cards, in particular, pass through the mail in compliance with the Postal Laws and Regulations. As is shown by the push-cards or raffle-cards filed as exhibits in this case and the envelopes in which mailed, they are accepted as third-class matter under "Permit No. 3121" issued by the Postmaster General under Postal Laws

and Regulations, Sec. 562, in the exercise of his jurisdiction "to execute all laws relative to the Postal Service." The regulations under which said permit was issued, and is continued in force, provide for right of examination of the contents and that specimens of "each mailing shall be examined upon receipt at the post office as will enable the receiving employees to ascertain that the particular mailing is from an authorized permit holder (that the rate privileges are complied with) * * * and *that the matter otherwise complies with postal requirements.*" [11]

We submit that where, as here, Congress has made clear its purpose that the "means" for chance distribution shall not be barred from the mails, and where, as here, the powers and duties to "execute all laws relative to the Postal Service" have been vested in the "Postmaster General" and that officer has knowingly issued and continues in force said mailing permit, it cannot reasonably be contended that the jurisdiction of the Federal Trade Commission is *by implication* to be regarded as including power to override that *manifest* determination of Congress and that *express* delegation of power to the Postmaster General and *his official action* in transmitting petitioners' raffle cards through the mails. Cf. *Federal Tr. Comm'n* v. *Bunte Bros.*, 312 U. S. 349.

In short, we submit the Federal Trade Commission may not by any process of attenuated inference in effect nullify the permit which the Postmaster General has issued.

(4) The assertion of an extra- (and in this case a contra-) statutorial public policy is inconsistent also with the com-

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[11] Judicial notice, of course, may be taken of the Regulations of the Post Office Department. *Deal* v. *United States*, 11 F. 2nd 3; *Petersen* v. *United States*, 287 Fed. 17; *Bruce* v. *United States*, 202 Fed. 98. The above quotation is from official forms for applications for license and from conditions stated in the license.

mon law classification of this subject matter as at most, *"malum prohibitum"* and not *"malum in se."* *In re Rapier*, 143 U. S. 110, 134; *People* v. *Monroe*, 349 Ill. 270, 275; *Fleming* v. *Foy*, 9 Fed. Cas. No. 4,862 at 263. Referring to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this Court said (*Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496):

> our federal system * * * leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. *It is not for the federal courts to thwart such local policies by enforcing an independent "general law"* (emphasis supplied).

But if the federal courts are to be left free to affect the rights of individuals by reference to some vague transcendent "public policy of the United States" it would appear that in the *Tompkins* case we have merely discarded the certainties of "federal general law" for the treacherous and elusive vaguities of a "federal public policy." "Public policy of the United States," unless clear and unquestioned, is not for the courts but for the Congress to declare.

Nor can this asserted "established public policy of the United States" be sustained on the theory of a uniform public policy among the States in this subject matter.—The policies in the several States are different and, significantly, the trend is away from the austere prohibitionism of a generation or two ago.

Thus the Illinois Supreme Court has recently said in *Albers, Receiver*, v. *Hanson*, 380 Ill. 35, 42-43, that until the Horse Racing Act of 1927 "gambling in general was regarded as contrary to the public policy of this State" but "The Horse Racing Act has made it clear that that public

policy is no longer in existence,"[12] Push cards and punch boards are freely used in many parts of the United States to such an extent that the present National Administration, under the National Industrial Recovery Act, approved a "Code of Fair Competition for Punch Board Manufacturing Industry"—Code No. 316. Even "slot-machines," extensively used in many states, are being realistically taxed by the Federal Government on a basis of revenue and not of prohibition. Internal Revenue Code, sec. 3267. The State of Nevada, by an Act approved March 19, 1931, and commonly referred to as the "Open Gambling Law," (Nevada Laws 1931, p. 165) has broadly legalized and licensed gambling upon the policy that, as with the liquor problem, regulation may be better than prohibition.[13]

It is not irrelevant to note that, adopting the realistic attitude which now characterizes the American attitude toward the liquor industry, the British Government, in 1932, appointed a Commission "to enquire into the existing law and the practice therein relating to lotteries, betting, gambling and cognate matters and to report what changes, if any, are desirable and practicable." The Report, a printed publication of some 180 pages, recognizes that existing statutory enactments are "archaic" and out of line with accepted social practice (Report of the Royal Commission on Lotteries and Betting, June, 1933, p. 70). It recognizes, also, that here is a social problem which must be faced realistically; and concludes that serious social consequences

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[12] Horse racing and betting thereon, a common and respected social practice in earlier years, was later prohibited in practically every State of the union, but since 1926 more than thirty states have again legalized this practice. The following list of such statutes is illustrative, not exhaustive: *New York*, Laws 1926, c. 440 and Laws 1934, c. 233; *Illinois*, Laws 1927; *California*, Laws 1933, c. 436; *Massachusetts* (p. 28), Laws 1934, c. 374; *Arizona*, Laws 1935, c. 79; *Florida*, Laws 1931, c. 14832; *Michigan*, Laws 1933, Act No. 199; *Ohio*, Laws 1933, p. 367; *Oregon*, Laws 1935, c. 244; *Washington*, Laws 1933, c. 55.

[13] See *State ex rel.* v. *Dunkle*, 53 Nev. 357, 1 Pac. (2d) 108.

are, as in the case of smoking or drinking, largely from *over* indulgence. The Report suggests, as a legislative policy, that "the general aim of the State in dealing with facilities for organized or professional gambling should be to prohibit or place restrictions upon such facilities and such facilities only as can be shown to have serious social consequences if not checked"; and that "in framing legislation with those objects in view, we regard it as of the utmost importance that not more prohibitions should be made than are absolutely necessary. Every new prohibition creates a new class of potential offenders."

All this emphasizes that the principle of "public policy" "must be cautiously applied to guard against confusion and injustice." *Steele* v. *Drummond*, 275 U. S. 199, 205. For, as this Court forcefully pointed out in *Patton* v. *United States*, 281 U. S. 276, 306:

> The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

2. THE DECREE OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS

In *Federal Tr. Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, as will appear from the record in this Court, the Commission's order was against "selling and distributing * * * candy so packed and assembled that sales of such candy to the general public *are* by means of a lottery, gaming device, or gift enterprise." In a subsequent case the Commission enlarged its order to read "candy so packed and assembled that sales to the general public are to be

made or *may be* made by means of a lottery, gaming device or gift enterprise."

It was pointed out that *any* candy howsoever packed or assembled "may be" made upon a chance basis and the extension of the order injected at least an ambiguity which might be oppressively applied. The manufacturer, at point of shipment, knows that many of his products "may be" distributed at point of destination upon a chance basis and to issue an order which might be interpreted and applied as requiring him to follow his merchandise to point of destination and there to control its ultimate disposition would be an unreasonable and burdensome restriction upon interstate commerce.

In *Federal Trade Commission* v. *A. McLean & Son,* 84 F. 2d 910 (C. C. A. 7), the court directed that the order be modified and that in lieu of the objectionable words "may be", there be substituted the words "are designed to be." (913)

There is conflict on this point, as clearly stated in the recent decision of *Lee Boyer's Candy* v. *Federal Tr. Comm'n,* 128 F. 2d 262 (C. C. A. 9) as follows:

> Other paragraphs of the order—paragraphs (2), (3) and (4)—are not here challenged. As to paragraph (1), petitioner's only objection is to the phrase "or may be made." This phrase, petitioner contends, makes the order too broad.
>
> Supporting petitioner's contention are: *Helen Ardelle, Inc.* v. *Federal Trade Commission,* 9 Cir., 101 F. 2d 718; *Federal Trade Commission* v. *A. McLean & Son,* 7 Cir., 84 F. 2d 910; *Federal Trade Commission* v. *Charles N. Miller Co.,* 1 Cir., 97 F. 2d 563; *Sweets Co.* v. *Federal Trade Commission,* 2 Cir., 109 F. 2d 296.
>
> Opposed are: *National Candy Co.* v. *Federal Trade Commission,* 7 Cir., 104 F. 2d 999; *Ostler Candy Co.* v. *Federal Trade Commission,* 10 Cir., 106 F. 2d 962; *Hill* v. *Federal Trade Commission,* 5 Cir., 124 F. 2d

104; *Kritzik* v. *Federal Trade Commission*, 7 Cir., 125 F. 2d 351.

We are asked by the Commission to overrule our decision in *Helen Ardelle, Inc.* v. *Federal Trade Commission*, supra. This we decline to do; for, although some courts have refused to follow it, we still believe our decision was correct.

The order is modified by striking from paragraph (1) thereof the phrase "or may be made."

It is to be noticed that in the *Boyer* case the Court has not made *substitution* for the words "or may be made" but has *stricken* them; thus, in effect reinstating the order in the scope and form approved in the *Keppel* case.

The issue, which in the above cases was only of secondary importance, is here the very crux of the controversy. In those cases the merchandise was specially prepared, packed and marked so that it was *committed* to distribution, i.e. was "designed to be" distributed on a chance basis as the order was modified in the *McLean* case. The merchandise in the instant case is not *committed* to chance distribution either by the arrangement, assembly and marking as in the candy cases or by commitment with the distributor, as in the *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. 2d 689, which the court below sought to distinguish (R. 118).

We submit that the conflict in decisions is not only significant in and of itself but emphasizes the importance of our first ground for certiorari, *viz.* that here in the substance of the case the Commission is seeking to extend its jurisdiction by mere inference to situations not within the facts of the previously adjudicated cases and in conflict with the manifest policy of Congress and with the Congressionally-recognized reserved rights of the States and with the exercise of the expressly delegated duties and powers of the Postmaster General as hereinbefore discussed in Point I.

Conclusion.

If the position of the circuit court of appeals is to be sustained, viz., that to "supply to or place in the hands of others" any and all "means" whereby property may be disposed of upon a chance basis is "contrary to the established public policy of the United States" (R. 119), then the Federal Trade Commission will have been recast in the role of a sort of national censorship bureau—a function for which it is neither manned nor funded and for which its procedure of case-by-case cease and desist orders is wholly unsuited.

This Court has announced and again and again confirmed that "It is for the Courts, not the Commission, ultimately to determine, as a matter of law" what constitutes an "unfair method of competition" under the Act. *Federal Trade Comm.* v. *Gratz,* 253 U. S. 421, 427. But as a result of the Commission's persistent insistence that it is proceeding under the mandate of this Court in the *Keppel* case, the lower courts, particularly the Seventh Circuit, appear to have become imbued with the view that any interpretation of "public policy" by them which would narrow the breadth of asserted jurisdiction would not be sustained in this Court. As a result, and as appears from the opinion of the court below, but slight consideration is now given to the question of public policy *vel non.*

Upon the theory confirmed by the court in the instant case and by individual cease and desist proceedings, the Commission is now asserting power to prevent the supplying of all "means" and the supply of all property whereby chance transactions may be carried on locally.

Certainly the *Keppel* case was not intended by this Court to become the touchstone for unlimited power which the Commission has sought to make it. The benefits to be derived, both by the lower courts and by business generally,

from a further definition of the rule there laid down abundantly recommend the favorable consideration of this petition.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

October 1942.

(2648)



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492997—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 462

PHILIP HARRY KOOLISH AND SARAH ALLEN KOOLISH, INDIVIDUALLY AND TRADING AS STANDARD DISTRIBUTING COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 118–120) is reported in 129 F. (2d) 64.

JURISDICTION

The opinion of the Circuit Court of Appeals and the decree affirming the order of the Federal Trade Commission were filed on June 9, 1942 (R. 118–120). Petition for rehearing was denied on July 16, 1942 (R. 151), and the decree of the Circuit

Court of Appeals was entered on the same day (R. 151–153). The petition for writ of certiorari was filed on October 16, 1942. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15 U. S. C. sec. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Commission and the court below erred in concluding that petitioners' plan of selling merchandise involves the use of a gambling device, and is an unfair method of competition in commerce.

2. Whether the court below erred in failing to limit the scope of the Commission's order.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. sec. 45, provides in part as follows:

> SEC. 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * * *

(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

STATEMENT

Petitioners seek review of a decree of the court below affirming and adopting an order of the Federal Trade Commission issued after notice and hearing in a proceeding under Section 5 of the Federal Trade Commission Act. The order (R. 100–101) directed petitioners to cease and desist from continuing certain unfair methods of competition in commerce.

The Commission's findings of fact (R. 95–100) may be summarized as follows:

Petitioners are engaged in selling and distributing in interstate commerce in competition with others a variety of articles of merchandise including flash lights, electric mixers, sport jackets, cosmetics, bill folds, pen and pencil sets, and others (R. 96). In carrying out this merchandising, petitioners use a certain "selling plan or method." Typical of this method of distribution is petitioners' plan for the sale of portable radio sets. Without prior request, petitioners distribute to individuals by mail push cards, together with literature and circulars describing the radio and the manner in which the cards operate. (R. 96–98.) A typical push card has on its face 62 partially perforated small disks, each printed with a feminine name and the word "Push." Concealed beneath

the surface of each small disk is a number that is disclosed when the disk is separated from the card by being pushed. That number determines the price which the person playing the card pays. The card also has on its face a large partially perforated disk to be removed when the entire card has been sold; beneath the surface of the large disk is a feminine name. The person who selected the small disk containing that name receives the principal prize, in this instance a radio. The instructions on the card explain that the disks concealing certain specified numbers shall receive subsidiary prizes. On the back of the card is a list of the feminine names followed by a blank space in which the person operating the card writes the name of the player pushing out each one of the disks. Illustrations of the principal prize (in this case a radio set) and the lesser prizes (in this case four combination pen and pencil sets) also appear on the card.

A letter, which accompanies the push card and the selling literature, informs the recipient that in order to obtain a radio for himself he need only show the enclosed materials to friends, neighbors, and persons with whom he trades and explain to them how they might obtain a radio [*i. e.,* by selecting the lucky name on the push card]. The letter also states that upon receipt of an order petitioners will send to the person submitting the order two radios and four combination pen and pencil sets; one radio to be retained by the push card oper-

ator, one radio to be given to the person who selected the name appearing under the large seal on the push card, and the pen and pencil sets to be given to persons who have pushed disks concealing certain specified numbers. The literature and push card are accompanied by a printed order form for the purchase of two radios and four combination pen and pencil sets at a total price of $16.95. Since the total sum of payments called for by the push card is $16.95, the operator of the card makes a profit equivalent to at least one radio.

Petitioners offer other articles and merchandise under a substantially similar plan, varying only in details. Each group of merchandise offered by the petitioners under the plan includes two identical principal articles and other articles of lesser value intended to be subsidiary prizes. Under the plan it is intended that one of the two identical principal articles of merchandise will be retained by the person using the push card, that the other will be given to the person selecting the name concealed beneath the large disk on each push card, and that the subsidiary prizes will be allotted to the persons selecting the disks concealing the prize winning numbers. In each instance the total amount of payments called for by the push card is exactly equal to the amount stated on the printed order form for the articles of merchandise referred to on the push card, plus one additional article identical with the principal prize. (R. 97–99.)

Many of the individuals and dealers to whom petitioners furnished push cards have used, and do use, the cards in distributing the merchandise bought from the petitioners. Thus the sale of merchandise according to petitioners' plan involves a game of chance to procure an article of merchandise at a price less than the normal retail price, and the use of the plan is contrary to the established public policy of the United States and in violation of the criminal laws. (R. 99.)

Petitioners' use of this method in the sale of merchandise has a tendency to divert trade to the petitioners from competitors who do not adopt the same or equivalent methods.[1] Many competitors of the petitioners are unwilling to adopt such methods and the trade of these competitors is injured by the tendency of purchasers to prefer peti-

[1] In the course of their business, petitioners have distributed more than a million of the merchandise offers of the type described above, accompanied by push cards, and have received orders for merchandise from individuals, dealers, and others to whom such offers are mailed. During the twelve months' period ending November 1940 they sold approximately $1,800,000 worth of merchandise. In most instances the orders received are for the articles listed on the printed order form mailed out with the push card and cover two identical principal articles and subsidiary premiums listed on the card. Petitioners receive orders from approximately one percent of the individuals and dealers to whom push cards and circulars are sent. When shipments are made on orders petitioners include literature and push cards relating to other merchandise under the same plan. About twenty-five percent of the persons to whom sales are made send reorders or additional orders. (R. 98–99.)

tioners' merchandise because of the element of chance involved in its sale. (R. 99–100).

The Commission accordingly found that this merchandising plan operates to the prejudice of the public and petitioners' competitors and constitutes an unfair method of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act (R. 100).

On the basis of these findings the Commission entered its order (R. 100–101) which provides that the petitioners "in connection with the offering for sale, sale, or distribution of any merchandise in commere," shall cease and desist from indirectly or directly:

1. Supplying merchandise together with push cards or other lottery devices that are used or may be used in selling or distributing such merchandise to the public;

2. Supplying push cards or other lottery devices, with merchandise or separately, that are to be used or may be used in selling or distributing such merchandise to the public, and

3. Selling merchandise by the use of push cards or other lottery devices.[2]

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[2] In their brief (p. 6) petitioners state erroneously that the order of the Commission in this case may be considered as an attempt broadly to prohibit the distribution of push cards or other gambling devices in interstate commerce, whether distributed with merchandise or distributed separately and independently. It is apparent that the Commission's order relates only to the use of push cards or lottery

ARGUMENT

The principal questions raised by petitioners in this case are settled by the decision in *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304. In that case the plan or method of selling candy, to be resold through lottery or gambling devices, was held to be an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act. In this case the Commission found that petitioners had adopted a plan or method of selling various articles of merchandise involving the use of a gambling or lottery device that unfairly diverts trade to petitioners from their competitors.[3] Upon this finding the Commission and the court below, we submit, correctly concluded that this plan involving an element of chance, is contrary to public policy and constitutes an unfair method of competition within the principle established in *Federal Trade Commission* v. *Keppel & Bro., supra.*

1. Petitioners attempt to distinguish the *Keppel* case on the ground that the push cards are supplied before the merchandise is ordered, that the custom-

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devices in connection with the sale of merchandise. Whether push cards or other lottery devices may be distributed independently of the sale of merchandise as separate articles of commerce is not an issue in this proceeding and no such claim has been made by the Commission in this case.

[3] The sufficiency of the finding in this case with respect to injury to competitors is settled by *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, which involved a substantially similar finding.

ers who purchase merchandise from them may or may not use the push card to re-sell the merchandise and that the payments to them for merchandise do not depend upon whether the push card is used or not, and, therefore, the merchandise is not "committed" to distribution to the public through the use of the gambling device as was the merchandise in the *Keppel* case (Pet. 2, 8–14).

But this distinction is without merit. The fact that the push card is furnished to the purchaser separately and before the order is placed does not alter the nature of petitioners' sales plan. Indeed, the prior distribution of the push cards emphasizes the character of the plan as a whole. It indicates that the scheme of merchandising rests on the intended use of the push cards and begins with their distribution. A plan which so closely contemplates, even though it does not formally require, the use of a gambling device is indistinguishable from that condemned in the *Keppel* case. The circuit courts of appeals have not recognized asserted distinctions of the character here urged. *Cf. Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. (2d) 689 (C. C. A. 7), certiorari denied, 302 U. S. 753, and cases cited *infra,* note 5.

It is also argued (Pet. 14–21) that the Commission erred in concluding that the merchandising plan, involving, as it does, a game of chance, is contrary to public policy; this contention is based on

the assertion that games of chance are in themselves neither criminal nor contrary to public policy. In support of this proposition petitioners urge that (1) Congress has failed to enact certain bills which, if enacted, would prohibit the sending of gambling devices through the mails; (2) several states have passed statutes authorizing horse racing; (3) the National Industrial Recovery Administration approved a code of fair competition for manufacturers of push cards; and (4) revenue from slot machines is taxed by the Federal Government. But whether or not these devices are criminal is beside the point. The question here presented is whether the use of a gambling device as part of a scheme to sell merchandise is an unfair method of competition. Competitors of petitioners refuse to attempt the same or similar schemes for selling merchandise despite the resultant loss in trade. And the compulsion which operates on competitors in this respect is indistinguishable from that involved in the *Keppel* case.

Moreover, the fact that both the state and Federal Governments tax revenues from other gambling devices does not reflect a public policy approving either the devices taxed or others. Nor does the failure of Congress to prohibit the mailing of these devices imply public approval of them.[4]

[4] The fact that the Postmaster General has issued a third-class mailing permit to petitioners does not establish any

That these devices do in fact offend public policy was indicated in the *Keppel* case; and the uninterrupted line of decisions in the federal courts since that case, condemning the use of push cards as part of a plan to sell merchandise [5] discloses that there has been no change in public policy in this respect.[6]

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conflict between the Commission's order and the postal regulations, as petitioners contend (Pet. 14–18). Nothing in the postal regulations or the statutes conferring authority on the Postmaster General suggests that Congress intended that he should have the power to grant immunity from the requirements of the Federal Trade Commission Act. In determining whether to grant a postal permit, the Postmaster General is not charged with any responsibility to decide upon the validity of merchandising plans under the Federal Trade Commission Act. And he cannot, by granting mailing privileges, foreclose the Federal Trade Commission from carrying out the duties with which it is charged by that Act. The granting of the mailing permits therefore did not give petitioners immunity from the requirements of Section 5 of the Federal Trade Commission Act. *Schreiber* v. *United States*, 129 F. (2d) 836 (C. C. A. 7), cited by petitioners, dealt with the propriety, under the postal classifications, of requiring that push cards be sent by first-class rather than by third-class mail. The Federal Trade Commission Act was in no way involved.

[5] See, for example, *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. (2d) 561 (C. C. A. 8), certiorari denied, 301 U. S. 691; *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. (2d) 718 (C. C. A. 9); *National Candy Co.* v. *Federal Trade Commission*, 104 F. (2d) 999 (C. C. A. 7), certiorari denied, 308 U. S. 610; *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. (2d) 689 (C. C. A. 7), certiorari denied, 302 U. S. 753; *Kritzik* v. *Federal Trade Commission*, 125 F. (2d) 351 (C. C. A. 7).

[6] In their brief (p. 12) petitioners suggest that their merchandising plan may be distinguished from that involved in

2. The Commission's order directs petitioners, in connection with offering merchandise for sale, to cease and desist from (1) supplying merchandise together with gambling devices that are to be used or "may be used" in selling or distributing merchandise to the public; and (2) supplying gambling devices either together with merchandise or separately, that are to be used or "may be used" in selling such merchandise to the public. The court below affirmed the order and adopted it verbatim as part of its decree. Petitioners contend that the decision of the Circuit Court of Appeals for the Ninth Circuit in *Lee Boyer's Candy* v. *Federal Trade Commission,* 128 F. (2d) 261, and cases cited therein, conflict with the decision below on the question whether the inclusion of the term "may be used" in the Commission's order is appropriate.

However, the affirmance of the Commission's order in the instant case does not conflict with the decisions relied upon by petitioners. In all those

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the *Keppel* case on the ground that there the candy was sold to children who were incapable of exercising mature judgment and that therefore an element of deception, which is here lacking, entered into the plan. It is clear, however, that the decision in the *Keppel* case does not depend upon the maturity of the ultimate consumers (see p. 309). (Cf. *Hofeller* v. *Federal Trade Commission*, 82 F. (2d) 647 (C. C. A. 7), certiorari denied, 299 U. S. 557; *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. (2d) 561 (C. C. A. 8), certiorari denied, 301 U. S. 691.

cases,[7] that part of the order from which the term "may be used" was stricken related to the distribution of merchandise which may be used as part of a lottery, and not to lottery devices which may be used as part of a merchandising scheme. A prohibition against distributing merchandise itself obviously should be more narrowly limited than a prohibition against distributing lottery devices in connection with merchandising.[8] It is apparent that there is no conflict in decision with respect to any issue that is raised in this case.

The character and terms of the orders which must be framed in these cases of necessity depend upon, and vary with, the practices sought to be prohibited in each particular case. The words "may be used" in the order in this case are particularly appropriate since petitioners' sales plan involves the distribution of the gambling device at a differ-

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[7] *Lee Boyer's Candy* v. *Federal Trade Commission*, *supra*; *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. (2d) 718 (C. C. A. 9); *Federal Trade Commission* v. *Charles N. Miller Co.*, 97 F. (2d) 563 (C. C. A. 1); *Sweets Co. of America* v. *Federal Trade Commission*, 109 F. (2d) 296 (C. C. A. 2).

[8] Indeed, in both the *Lee Boyer's* case and the *Helen Ardelle* case (on which the former rests) another portion of the order contained an almost identical provision with that involved in this case. In the Commission's order in this case there is no paragraph comparable to that from which the words "may be used" were stricken in the *Lee Boyer's* and *Helen Ardelle* cases.

ent time than the distribution of the merchandise. The order was framed to prevent the petitioners from continuing to supply a gambling device as part of their merchandising plan and then disclaiming responsibility for its subsequent use in reselling that merchandise.

In other circumstances, slightly different formulations may suffice to cover the evils sought to be prevented. But, in any event, the differences in phraseology which the allegedly conflicting decisions permit raise no questions of substance with respect to the statute or the Commission's power thereunder. They are addressed merely to the appropriateness of the language of the decree, on the objectives of which the courts are in complete agreement.[9]

CONCLUSION

The decision below is correct, no conflict with decisions in other circuit courts of appeals is established, and no important question is presented on

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[9] Thus even in the allegedly conflicting cases the changes imposed by the reviewing courts were not substantial. In *Federal Trade Commission* v. *Charles N. Miller Co.*, 97 F. (2d) 563 (C. C. A. 1), the court changed the word "may" to the words "are designed to be." Similarly in *Sweets Co. of America* v. *Federal Trade Commission*, 109 F. (2d) 296 (C. C. A. 2), the court modified "may be" to "are likely to be." See *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. (2d) 718, 721 (C. C. A. 9). There is little difference in the effect of these phrases so far as the objective of eliminating the unfair method of competition is concerned.

this record.[10] It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
ROBERT C. BARNARD,
Special Attorney.

W. T. KELLEY,
Chief Counsel, Federal Trade Commission.

NOVEMBER 1942.

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[10] Petitioners state, as one of the questions presented (Pet. 3, 7) that the evidence is not sufficient to support the Commission's findings (a) that many persons to whom petitioners furnished push cards subsequently used those cards in selling and distributing merchandise, and (b) that many persons are attracted by petitioners' sales plan by reason of the element of chance involved therein and are thereby induced to buy and sell petitioners' merchandise in preference to that offered for sale by competitors.

Petitioners assert that they do not rely upon this question as a reason for granting a writ of certiorari, but state that they do intend to brief the point if the writ is granted. (Pet. 7.) It is sufficient to point out in these circumstances that the Circuit Court of Appeals, after examining petitioners' contention, has unanimously concluded that the Commission's findings are supported by the evidence (R. 119).

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No. 462

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OCTOBER TERM, 1942

PHILIP HARRY KOOLISH AND SARA ALLEN KOOLISH, INDIVIDUALLY AND TRADING AS STANDARD DISTRIBUTING COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

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REPLY BRIEF FOR PETITIONERS.

The Commission's brief essentially begins and ends with the decision in *Federal Tr. Comm'n* v. *Keppel & Bro.*, 291 U. S. 304. But such reliance is without warrant either upon the record or in the opinion in that case.

This Court did not in the *Keppel* case indicate that the devices here in question in fact offend public policy. More

important, because Congress has indicated a paramount permissive public policy with respect to petitioners' activities, it was and is beyond the power of any court—and *a fortiori* beyond the power of the Commission—to declare that the mere supplying of raffle cards to others—together with merchandise or separately, does violate public policy.

Public policy, when not deducible from constitutional or statutory provisions, "is accepted as the basis of judicial determination, if at all, only with the utmost circumspection". *Patton* v. *United States,* 281 U. S. 276, 306.

It is a necessary corollary that determination in the *Keppel* case of a violation of law based entirely upon a purely judicial determination of prohibitory public policy cannot in this case, and as to different devices, be strained to control over and against the expression by Congress of a permissive public policy, particularly where there are lacking the pivotal facts in the *Keppel* case upon which this court based its decision.

The question there stated by the Commission to be presented for decision was whether "the sale of assortments of candy so arranged that they may be resold to children in a manner involving lot or chance" may be held to be "unfair" within the meaning of the Act.[1] On the merits the Commission urged that "as indicated in *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453, each case must be decided on its own facts", and it asserted that while the candy packages there involved were not actually fraudulent or deceptive, the invitation to "children" to engage in a chance transaction was "assimilable to deception".[2]

There was thus presented, and this Court decided, no broad question as to the existence of an "established public

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[1] Commission's Pet. for Cert., p. 2.

[2] Commission's Reply Brief on Merits, pp. 2-5.

policy of the United States" against transmission through federally controlled channels of chance devices. This Court said (*Fed. Tr. Comm'n.* v. *Keppel & Bro.*, 291 U. S. 304, 309, 313):

> * * * the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package * * *
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> * * * * * * *
>
> * * * we can perceive no reason for distinguishing between the element of chance *as employed here* and *the element of deception involved in labelling cotton goods "Natural Wool"*, as in the *Winsted* case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. (Emphasis supplied)

Thus, this Court found that the "break-and-take" candy packages there involved in effect constituted a constructive deception of the particular customers there involved—children.

So far as the Commission's jurisdiction is here sought to be rested upon a public policy recognized and applied in the *Keppel* case, that jurisdiction must fail. For the public policy there recognized was limited to inhibition of chance devices involving constructive deception. To rest jurisdiction in this case upon the an asserted right to enforce the same public policy would therefore be to satisfy the requirement of jurisdiction by a pure fiction. No of-

fense against such public policy is here involved. Here there is no element of child consumers and there has been no suggestion, much less any evidence, of resulting deception, constructive or otherwise.

But jurisdiction purportedly based on enforcement of an "established Federal public policy" must here fail for another and more obvious reason. The prohibitory public policy recognized by this Court in the Keppel case cannot by virtue of any purported analogy of devices properly be extended so as to create jurisdiction in the Commission to promulgate the prohibitions made in this case. Such extension of the public policy found to exist in the *Keppel* case would bring judicially-declared prohibitory public policy into sharp conflict [3] with permissive and controlling public policy which Congress, vested with paramount authority in this field, has indicated shall apply to petitioners' activities. That it is the firmly established affirmative intent of Congress *not to prohibit* chance means for interstate commerce or the mails where, as here, the sender retains no control over or interest in the operation of the means by the recipient, is demonstrated in the Petition, p. 15 et seq., pars. (1), (2) and (3).

It is established that the Commission, and the Courts in reviewing its decisions, *Fed. Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, must recognize that the Federal Trade Commission Act forbids only those acts or practices "which

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[3] Of course, petitioners have never asserted any theory of "conflict between the Commission's order and the postal regulations" such as the strawman with which the Commission here tilts (Br. in Opp., pp. 10-11, note 4). The particular sphere of federal legislation in which Congress has clearly manifested the necessarily controlling public policy with respect to petitioners' activities, it so happens, is in postoffice legislation. It results, therefore, that the action of the Postmaster General in granting mailing permits to petitioners does lend affirmative emphasis to the manifestations of permissive public policy which, through persistent rejection of proposed legislation, had been evidenced by Congress in a negative but nonetheless definite manner.

offend against existing law and could be the subject of judicial condemnation without further legislation" or which may by the commission properly be determined to be wrong under "established principles of law." *Schechter Corp.* v. *United States*, 295 U. S. 495, 541. *Fed. Trade Comm.* v. *Sinclair Co.*, 261 U. S. 463; *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565; *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307.

There is no more firmly established principle of law than the rule that paramount power to determine public policy resides in the Congress, not in the courts or in the Federal Trade Commission. The courts and the Commission may independently determine what is the public policy only when the question has not been concluded by Congressional action.

Here, as shown in the Petition, Congressional rejection of legislation makes it manifest that the established public policy of the United States does not forbid but rather permits the placing in the hands of others of the means whereby property may be disposed of upon a chance basis.

Importance of the Issues.

The Commission suggests that its jurisdiction to prohibit the distribution of "push cards or other lottery devices—independently of the sale of merchandise as separate articles of commerce, is not an issue in this proceeding and no such claim has been made by the Commission" (Br. in Opp., p. 8, note 2).

But it is clear that the Commission is claiming such jurisdiction in pending cases (Petition, p. 6, note 3), and the order and decree here in question do profess to prohibit the distribution of the raffle cards not only "together with" merchandise but "separately" therefrom (R. 101, 152). And the opinion of the Circuit Court of Appeals gives approval to no such narrow set of facts as the Commission

suggests. It epitomizes and gives specific approval to what it states to be the Commission's finding "that petitioners supplied to and placed in the hands of others, means of conducting lotteries in the sale of merchandise," and holds that this is "contrary to the established public policy of the United States" (R. 119).

There would seem to be little ground for making a distinction which while withholding jurisdiction of the Commission where the distributors of the raffle cards are manufacturers or distributors of raffle cards alone, would permit its exercise against those who are distributors of other merchandise as well. "Push-cards" and "pull-cards" are used for raffling merchandise (*Schreiber* v. *United States*, 129 F. 2d 836, 837) and the mere fact that an act or practice is carried on in or in connection with the sale of merchandise, does not in itself establish jurisdiction of the Commission to prohibit such acts or practices. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Fed. Trade Comm.* v. *Sinclair Co.*, 261 U. S. 463; *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565.

The Commission's course is petty. It does not and cannot prohibit games of chance or the use of push cards. Others will and do supply the cards; and others will and do supply the merchandise.[4] Prohibitions against the use of push cards, if any there be, go unenforced in many states and municipalities. The cards and merchandise are observable not only in city shops but in army canteens, tobacco stands, and country stores.[5]

[4] So far as we are aware, neither the manufacture nor the sale of punch boards or raffle cards is prohibited in any of our states. See the *Code of Fair Competition for the Punch Board Manufacturing Industry, National Recovery Administration*, approved by the President on March 2, 1934, wherein it is stated at pages 440-441: "During 1929 approximately 2500 wage earners were employed and in 1931 approximately 1800 wage earners were employed.

[5] Many department stores carry and sell not only raffle cards but as well merchandise which may be purchased for distribution by means of the raffle cards.

In the case at bar, the Commission's own witness testified that Mont-

Petitioners' methods are therefore not even unethical and, even if they were, this Court has specifically held that "the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men." *Fed. Tr. Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 313. The Commission nevertheless continues to push its jurisdiction in the direction of establishing what it conceives to be proper standards of public morals. The circuit courts of appeals, perceiving lurking phrases respecting "public policy" in the *Keppel* case and in the opinions of other circuits, leave the matter to this Court.

Since the Federal Trade Commission now treats the *Keppel* decision as creating a whole new field of jurisdiction, it is obvious that the issue of jurisdiction of the Commission based upon determinations of "established Federal public policy" which, initially at least, must be made by it, will become a constantly recurring question of ever-increasing importance. It is therefore respectfully submitted that as to the broad and all-inclusive interpretation announced and applied by the circuit court of appeals, this Court should hold, as it did in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 354:

> The construction of section 5 urged by the Commission * * * of such far reaching import as is involved here, ought to await a clearer mandate from Congress.

November, 1942.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

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gomery Ward & Company sells "poker chips and games of chance" and also other items of merchandise which might be purchased as "prizes" for distribution in connection therewith (R. 42).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

The petitioners submit this petition for rehearing and in support thereof respectfully show:

1. The circuit court of appeals has declared the broad and all inclusive position that supplying to or placing in the hands of others the "means" (raffle cards in this case) whereby merchandise may be disposed of on a chance basis

is against "the established public policy of the United States" (R. 119) and that therefore petitioners may be prohibited by order of the Commission (R. 100) and by like decree of the Court (R. 151-153) from distributing through federal channels raffle cards "together with" merchandise or even "separately" therefrom.

2. That position of the circuit court of appeals so declared and applied is in direct conflict with "the established public policy of the United States" clearly manifested by Congress that such "means" *shall not be prohibited* from federal channels and that the extent to which such means are to be used, regulated or prohibited shall be left to the jurisdiction of the several states. (See citations and references in our Petition for Certiorari, p. 14, par. c. and pars. (1), (2) and (3) following.

3. The policy of Congress as thus clearly manifested by it in its regulation of the channels of interstate commerce and the mails is, of course, paramount. (Const., Art. 1, Sec. 8). The federal judiciary may not validly declare and enforce a "public policy" with reference to those channels in conflict with the "public policy" manifested by Congress; and so, in interpreting the indefinite terms of the Federal Trade Commission Act it may not, by resort to its own concepts of what should be the public policy, find an implied intent in the Act in conflict with the established policy and intent clearly manifested by Congress.

4. The Postmaster General, in accordance with the Postal Laws and Regulations which carry out said established policy and intent of Congress *not to prohibit* those "means" from federal channels has with full knowledge of the facts issued and continued in force an official postal permit to distribute these "means" through the mails. (Petition for Certiorari, p. 17). Like permits have been issued to others,

the crucial point of their validity as mailable matter being pointed to by the circuit court of appeals in its decision in *Schreiber* v. *United States,* 129 Fed. 2d 836, quoted in our Petition for Certiorari, p. 17. And yet the instant decision of the circuit court of appeals purports to find in the Federal Trade Commission a delegated power to nullify, in effect, the public policy and statutory authority recognized by the permit so issued by the Postmaster General.

5. There is thus an unresolved conflict between a *judicially* declared "established public policy of the United States" with respect to matters moving in interstate commerce and *Congressionally* determined public policy with respect to such matter; and resulting conflict in purported official action in reliance on those respectively determined but contrary policies.

6. This conflict, we respectfully submit, merits the consideration and determination of this Court because of the inherent public importance of these issues and because of the conflicts in purportedly authorized official action and other consequences resulting therefrom.

7. But beyond all this is an importance of deeper and more general significance. Underlying this controversy, and indeed producing it, is a sociological problem. We are here confronted with the very situation to which this Court alluded in *Patton* v. *United States,* 275 U. S. 199, 205:

> "the public policy of one generation may not, under changed conditions, be the public policy of another."

That there is a manifest recession from the austere prohibitionism in public policy and social practice in the matter of raffles, betting, horse racing and other chance transactions has been recognized by the Illinois Supreme Court in its recent decision quoted in our Petition for Certiorari

(p. 19) and is confirmed by the recent appointment of the British Royal Commission on Lotteries and Betting and by the findings in their report. (See quotations in our Petition, p. 20-21.) As confirmed by said report, here is a social problem which must be faced realistically; and in considering a sound governmental policy, "it is of the utmost importance that not more prohibitions should be made than are absolutely necessary. Every new prohibition creates a new class of potential offenders."

In an analogous problem, the liquor question, we found that even writing a solemn prohibition into the Constitution, and spending millions of dollars endeavoring to enforce it, did not stop or even diminish—some say only increased—the demand for alcoholic beverages. In a short time we had an acute sociological problem. And the repeal of the Eighteenth Amendment followed.

There the Federal judiciary had no responsibility but to apply the Constitution and prohibitions of Congress as expressly enacted. But here the situation is different. Here the prohibitions set forth in the order of the Commission and the decree of the lower court are set forth neither in the Constitution nor in any enactment of the Congress. Whatever prohibitions are to be found in the implications of the Federal Trade Commission Act are, as announced by this Court in many of its decisions, for the final determination of this Court. That responsibility has here been recognized by the granting of certiorari in *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304 and *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

In assuming to impose as an established "public policy of the United States" an absolute prohibition upon the supplying of raffle cards through the mail which may or may not be used by the recipients in chance distribution

of merchandise, the courts have embarked on a course of judicial legislation incompatible in general with their true function and at war in particular with the paramount public policy on the subject clearly indicated by Congress.

We submit this Court should not, without more extended consideration than it has heretofore had opportunity to give the subject, commit the Federal judiciary or invite the federal administrative arm to a course of arbitrary experimental prohibitionism in a sea of shifting and uncertain social trends. Such a responsibility is for Congress.

We therefore respectfully submit that the petition for certiorari should be granted in order to permit full consideration and determination of the important issue here involved.

Respectfully submitted,

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

Certificate.

Petitioners' counsel hereby certify that this petition is presented in good faith and not for delay. In further evidence of this we certify that we have advised the petitioners to comply with the order and decree below effective as of this Court's denial of certiorari, viz., November 23, 1942, and until the further order of this Court. The clients have assured us that our advice is being followed and we have every reason to believe that that is so.

IRVIN H. FATHCHILD.